

TAN YAR JOO @ CHAN YIK YEE

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v.

SIN YEE ESTATE SDN. BHD.

HIGH COURT MALAYA, IPOH
TUAN KANG HWEЕ GEE JC
[COMPANIES (WINDING-UP) NO. 28-39-1994]
29 MARCH 1995

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COMPANY LAW: *Petition to wind-up a company - Petition not stating in what capacity petitioner was petitioning - Petitioner's capacity explained in supplementary affidavit - Whether petition valid - Whether petitioner had locus standi to present the petition - Consideration of s. 217 Companies Act 1965 - Whether petition should be struck off.*

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PRACTICE & PROCEDURE: *Petition to wind-up a company - Petition not stating capacity of petitioner - Whether defect curable by resort to O. 2 r. 1 Rules of the High Court 1980 - Whether defect procedural in nature - Whether defect formal in nature - Whether resort could be had to r. 94(1) Companies (Winding-up) Rules 1972.*

The petitioner petitioned to wind-up the respondent company. The petition did not state the capacity in which the petitioner was making the petition. The verifying affidavit disclosed that the petitioner was one of the five directors of the respondent. The petitioner subsequently filed a second affidavit in which it was stated that he was a contributory holding 88,800 shares in the respondent company.

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At the hearing of the petition, Counsel for the respondent argued that the petitioner did not have the *locus standi* to present the petition as neither in his petition nor the verifying affidavit did he state his *locus standi*. Counsel further submitted that a director did not have the *locus standi* to petition and argued that it was not open to the petitioner to cure this defect by filing a supplementary affidavit.

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Held:

[1] A director is clearly not included in the list of persons in s. 217(1) of the Companies Act 1965 (the Act). A company is a creature of statute and it follows that any right conferred by statute could only be derived from the statute itself. Much as a director is endowed with wide powers for various purposes under the Act, it does not clothe him with the right in his capacity as director to petition for the winding-up of the company.

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[2] It is trite that sufficient particulars of the allegations relied on by a petitioner must be so stated in the petition in order to enable the respondent to be informed of the nature of the case which he has to meet and a failure to do so may well result in the petition being struck out. The standing of the person to present the petition must surely be a necessary primary fact which must be stated in his petition not only because the respondent needed to be informed, but also because his standing constitutes the very foundation of his right to petition without which the Court will not hear him.

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[3] Under r. 26 of the Companies (Winding-up) Rules 1972 (the 1972 Rules), a verifying affidavit serves as *prima facie* evidence of the statements in the petition. It follows therefore that an affidavit purporting to verify a particular fact in the petition could only verify evidence that exists in the petition and there could not be any such verification in the second affidavit in the instant case on the petitioner's standing as that statement does not exist in the petition itself.

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a [4] The petitioner's Counsel's proposition that resort could be had to O. 2 r. 1 of the Rules of the High Court 1980 was unacceptable as O. 2 r. 1 only allows the condoning of minor procedural defects. The failure to state the petitioner's *locus* was plainly a substantive defect as it undermines the petitioner's right to present his petition. Neither could the defect be waived by the Court by resorting to r. 194(1) of the 1972 Rules as they are not formal in nature.

b [Petition struck off with costs].

Cases referred to:

Re HL Bolton Engineering Co. Ltd. [1956] Ch. 577 (*refd*)

Re WR Willcocks & Co. Ltd. [1973] ALL ER 93 (*refd*)

United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd & Ors. [1983] 1 MLJ 206 (*refd*)

c *Re Lundie Brothers Ltd.* [1965] 2 ALL ER 692 (*fol*)

Re Fildes Bros. Ltd. [1970] 1 ALL ER (*fol*)

Re Charterland Stores and Trading Co. [1900] 2 Ch. 870 (*refd*)

Legislation referred to:

Companies Act 1965, ss. 217(1), 217(1)(c), 218

d Companies Act 1988 (Cap. 50) (Singapore), s. 253(1)

Companies Act 1948 (UK), s. 210

Companies (Winding-Up) Rules 1972, rr. 22, 26 & 194(1)

Rules of the High Court, 1980 O. 2 r. 1(1)

Other source referred to:

Company Law, Walter C.M. Woon

e For the petitioner - *Lee Yen Lyn (Siew Mei Lin with her); M/s. Chan & Associates.*

For the respondent - *Hira Singh; M/s. Asbir, Hira Singh & Co.*

JUDGMENT

Kang Hwee Gee JC:

f This is a petition filed by Mr. Tan Yar Joo to wind-up the respondent company Syarikat Sin Yee Estate Sdn. Bhd. under s. 218 of the Companies Act 1965.

Basically, the petition was grounded on the allegation that the substratum of the company has disappeared as the main object of the company to carry on the business of rubber cultivation can no longer be carried out. The respondent by its chairman and joint managing director, Yap Fook Seng filed an affidavit in opposition opposing the petition which in substance denies that the substratum of the company has failed as the objects of the company are sufficiently wide to allow it to undertake other profitable ventures.

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Under s. 217(1) of the Companies Act 1965 the persons who may petition for the winding-up of a company are:

a) the company;

h b) any creditor, including a contingent or prospective creditor of the company;

c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;

d) the liquidator;

i e) the Minister pursuant to s. 205 or on the ground specified in s. 218(1)(d);

f) in the case of a company which is a licensed institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under s. 24(1) of the Banking and Financial Institutions Act 1989, or a non-scheduled institution in respect of which such Minister has made an order s. 93(1) of that Act, Bank Negara Malaysia.

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In his petition the petitioner did not state in what capacity he had petitioned the Court to wind-up the respondent company. Neither did he state so in his affidavit verifying the petition save to say in para. 13 and 14 that that he is one of the 5 directors of the respondent company. The petitioner only made it clear in his 2nd affidavit (encl. 14, affirmed on 12 December 1994 after having been served with the respondent's affidavit in opposition) that he is in fact holding 88,800 shares in the respondent company (*vide* share certificate exhibited as "TYJ1") in his capacity as the administrator of the estate of his late father Tan Phang Nam (*vide* the Grant of Probate exhibited as "TYJ10") and is therefore a contributory under proviso (c) of s. 217(1) of the Act.

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At the hearing of the petition before me Counsel for the respondent raised a preliminary point which he had raised in his affidavit in opposition that the petitioner did not have the *locus standi* to petition the Court as neither in his petition nor the verifying affidavit did he state his *locus standi*. A director he submitted, has no *locus standi* to petition. It was not open to the petitioner to cure this defect by simply filing a supplementary affidavit although it was open to him to amend his petition had he been so minded. The petition he contended, was an abuse of the process of the Court and ought to be struck out.

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First I will consider the position of the director, whom the petitioner's Counsel in her argument maintained has *locus standi* to present a petition.

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A director is clearly not included in the list of persons in s. 217(1). The learned author of *Company Law*, Walter C.M. Woon relying on *Re HL Bolton Engineering Co. Ltd.* [1956] Ch. 577, 581, in interpreting the equivalent proviso in s. 253(1) of the Singapore Companies Act (Cap. 50 1988) expresses the view that the list is exhaustive and that a director therefore has no *locus standi* to present a petition for winding-up. I could do no better than to agree with him. A company is a creature of statute. It follows therefore that any right conferred by statute (in this case the Companies Act 1965) could only be derived from the statute itself. Much as a director is endowed with wide powers for various purposes under the various provisos in the Act, it does not clothe him with the right in his capacity as director to petition for the winding-up of this company.

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I will now consider the question whether the petitioner in this case could supplement his petition by the 2nd affidavit.

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Rule 22 of the Companies (Winding-Up) Rules 1972 provides that every petition for winding-up of a company may be in Form 2 or 3 and by r. 26 every such petition shall be verified by an affidavit in Form 7. The petitioner in this case appears to have used the format of Form 2 where the first 4 paragraphs appear to be standard formalities. However, thereafter as indicated in the form, the facts on which the petitioner relies to support his petition would have to be stated in the preceding paragraphs.

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It is trite that sufficient particulars of the allegation relied on by a petitioner must be so stated in the petition in order to enable the respondent to be informed of the nature of the case which he has to meet and a failure to do so may well result in the petition being struck out (*Re W R Willcocks & Co. Ltd.* [1973] ALL ER 93). Now, the standing of the person to present the petition must surely be a necessary primary fact which must be stated in his

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a petition not only because the respondent needed to be informed, but also because his standing constitutes the very foundation of his right to petition without which the Court will not hear him.

b I am unable to accept Counsel's argument that the petition itself need not state the petitioner's standing and that this fact could be stated in the verifying affidavit which in this case had been verified by the 2nd affidavit. Under r. 26 of the Companies (Winding-up) Rules 1972 a verifying affidavit serves as *prima facie* evidence of the statements in the petition. It follows therefore an affidavit purporting to verify a particular fact in the petition could only verify evidence that exists in the petition and there could not be any such verification in the 2nd affidavit in the instant case on the petitioner's standing as that statement does not exist in the petition itself. The interplay between a statement and an affidavit is best illustrated by the case of *United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 MLJ 206 where it was held that any defect or omission in a statement of claim could not be made good by an affidavit in support of an application for summary judgment under O. 14 of the Rules of the High Court. Although that case is concerned with omissions of statements in writs, the same principle should apply to omissions of statements in petitions.

d I should perhaps make my point clear in this respect by referring to the case of *Re Lundie Brothers Ltd.* [1965] 2 ALL ER 692. In that case it was held (at p. 699 C) that a petitioner who petitioned for relief on ground of oppression under s. 210 of the UK Companies Act 1948 was not entitled to such relief as "no case is either pleaded or has been established for concluding that the company's failure to pay dividends was oppressive to the shareholder of the company". The petitioner's argument in that case that the Court should be concerned with evidence and not the allegations in the petition was answered in the following words of Plowman J:

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f Parenthetically, there is here a point which I think that I should mention. It was suggested in the course of argument that it was really the evidence not the allegations in the petition which was of importance in this matter. I entirely dissent from this proposition. It seems to me that it would be wrong for the Court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity. However, that may be, in my judgment the petitioner has failed to establish any case of oppression in regard to the matters to which I have referred.

g The same principle against "travelling outside the petition" was applied by Megarry J in *Re Fildes Bros. Ltd.* [1970] 1 ALL ER where His Lordship found it appropriate to quote the words of Simonds J in the earlier case of *Re Cuthbert Cooper & Sons Ltd.* [1937] 2 ALL ER at 468 as follows:

For the purpose of determining whether the petition should be granted or not, it is necessary for me to look at the allegations in the petition and I do not propose to travel beyond them.

h As a last resort before me Counsel for the petitioner argued that even if the petition was defective this could be cured by the Court exercising its discretion to condone the defect under O. 2 r. 1(1) of the Rules of the High Court which should be exercised in this case as clearly the petitioner had shown by his 2nd affidavit that he had the *locus standi* as a contributory. With respect I am unable to accept this proposition for the reason that O. 2 r. 1(1) only allows the condoning of minor procedural defects, not substantive defects. The failure to state the petitioner's *locus* was plainly a substantive defect as it undermines the

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petitioner's right to present his petition. Neither in my view, could the defect be waived by the Court by resorting to r. 194(1) of the Companies (Winding-up) Rules 1972, as they were not formal in nature (see *Re Charterland Stores and Trading Co.* [1900] 2 Ch. 870.)

The proper course for the petitioner to take in the present case in my view is to amend his petition which for some unexplained reason was not resorted to although he had early notice of the respondent's objection in the affidavit in opposition. Neither did the petitioner's Counsel appear willing to adopt this course of action at the hearing. I am therefore constrained for the reasons stated, to allow the respondent's preliminary objection. The petition is struck off with costs.

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